STRAITS SETTLEMENTS REPORTS.

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[ORIGINAL CIVIL JURISDICTION]
McELWAINE, C. J.
January 8, 1937.

MACPHAIL & CO. LTD. ..... Plaintiffs

vs.

HARPER GILFILLAN & CO., LTD. .. Defendants

[SINGAPORE SUIT No. 337 of 1936.]
[SUMMONS IN CHAMBERS No. 1063 of 1936.]

Courts—Jurisdiction—claim for declaration not essential to cause of action—payment into Court—amount paid not exceeding $500 in the aggregate—acceptance by plaintiffs in full satisfaction of claim.

In an action the plaintiffs claimed a declaration that they were entitled to have a bill or bills of lading issued to them, for loss of interest and for certain arbitration costs. The amounts claimed for special damage did not exceed in the aggregate the sum of $500/-. These were duly paid into Court by the defendants and accepted by the plaintiffs in satisfaction of the claims in respect of which they were paid in. The plaintiffs thereupon abandoned their other claims in this action. The statement of claim disclosed no special ground why a declaration should be made. On an application taken out by the defendants for an order that the plaintiffs do recover the costs of the proceedings on the District Court scale and for costs of the application

Held, that the action should have been brought in the District Court and that the Plaintiffs were only entitled to the costs as they would have been entitled to if the proceedings had been brought in the District Court.

SUMMONS IN CHAMBERS.

Seth for the plaintiffs (respondents on the application).

Spenser Wilkinson for the defendants (applicants on the application).

McELWAINE, C.J.—This Summons No. 1063 of 1936 was taken out by the Defendants for an order under Order 23 Rule 2 (3) of the Rules of the Supreme Court 1934 that the Plaintiffs do recover any such costs as they would have been entitled to if these proceedings had been brought in the District Court and for the costs of the application.

On 20th July, 1936 the Plaintiffs commenced an action against the Defendants claiming in the Writ a declaration that on or about the 30th May, 1936 the Defendants (as agent for the Prince Line) were under a Statutory duty to issue to the Plaintiffs a bill of lading in respect of rubber shipped on S.S. Malayan Prince and that the Defendants as such agent wrongfully withheld such Bill of Lading from the Plaintiffs and for damages.

About 1st September, 1936 the Defendants paid $89.19 into Court in satisfaction of the Plaintiffs' claim for damages with a denial of liability.

On the 14th November, 1936 Plaintiffs filed and delivered the Statement of Claim in which two heads of special damage were mentioned $89.19 loss of interest and $225 certain arbitration costs.

The Plaintiffs claim:—

1. A declaration that the Plaintiffs were entitled to have a bill or bills of lading issued to it for the rubber and that the Defendants' company as agent of Prince Line was under a Statutory duty to issue such Bill or Bills of Lading to the Plaintiffs.
2. Payment of the said sums of $89.19 and $225.
3. General damages.

About 15th December, 1936 the Defendants paid $225 into Court with an admission of liability. They made no reference to their right to a declaration.

On 23rd December, 1936 the Plaintiffs accepted the sums of $89.19 and $225 paid by the Defendants into Court in satisfaction of the claims in respect of which they were paid in and abandoned their other claims in this action.

The total amount recovered was then $314.19 a sum well within the jurisdiction of a District Court. The Defendants say the action should not have been brought in the High Court: the Plaintiffs reply that as he asked for a declaration he was bound to go to the High Court.

In my opinion it was quite unnecessary to ask for a declaration and the action might well have been brought in the District Court.

The District Court is provided so that litigation for small amounts may be conducted inexpensively.

If Plaintiffs are to ask for declaration nearly every case could be framed so as to oust the jurisdiction of the District Court though the amount in dispute might be only a few dollars

Without any prayer for a declaratory order the Statement of Claim showed a good *prima facie* cause of action. To succeed the Defendants must have denied the facts alleged or shown that the Carriage of Goods by Sea Ordinance did not apply.

Now the Plaintiff says he had to abandon his other claims in the action to get the money out of Court. That does not get rid of the fact that he did abandon his claim for a declaration. But even if he had not abandoned it I do not think a declaration should have been made. There is nothing in the Statement of Claim showing any special reason why a declaration should be made.

Mr. Seth relied strongly upon two cases—*Simmonds* v. *Newport etc.*, (1921) 1 K.B. 616 and *Grant* v. *Knaresburg Urban District Council*, (1928) 1 Ch. 310. In my opinion neither case is in point.

In the former a colliery refused to grant to a boy a document which an Act of Parliament directed should be delivered to him. He had a

right to the document but he had suffered no special damage through the denial of his right. It was a document which he was entitled to receive every pay day. The defence among other things alleged that the defendant was not bound to deliver this document. Damages would only have been nominal and would not have been appropriate. It was itself an action for the recovery of property namely the document on each and every pay day.

In the second case it was the defendants which withdrew the defence, not the plaintiffs who withdrew the claim. A public body demanded an illegal form to be filled up. Failure to complete the form (if valid) would have exposed the plaintiffs to a prosecution. The mere withdrawal of the defence in our particular case would not have secured the judicial condemnation of the document which was the object of the Suit.

In my opinion it was quite unnecessary to ask for a declaration and the Suit should have been brought in the District Court.

I therefore order that the plaintiffs do only recover such costs as they would have been entitled to if the proceedings had been brought in the District Court. The costs of the application are to be paid by the plaintiffs to the defendants.

Solicitors for the Plaintiffs—*Sisson & Delay.*

Solicitors for the Defendants—*Donaldson & Burkinshaw.*

[APPELLATE CIVIL JURISDICTION]

THOMAS, C.J. (F.M.S.),

MILLS & CUSSEN, JJ.

January 25, 1937.

IN THE ESTATE OF HAMEED NACHIAL alias HAMEED NACHIA OTHERWISE SPELT HAMEED NATCHIA DECEASED.

[SINGAPORE CIVIL APPEALS Nos. 2 & 3 of 1936].

Practice—grant of probate—passing over executor—Probate & Administration Ordinance, 1934, S. 54.

A testator died on May 30, 1935, leaving a will whereby he appointed A.H.M. and M.M. executors thereof. A period of more than six months elapsed during which there had been no application for probate. On March 5, 1936, the Solicitor General filed a petition praying for grant of letters of administration with will annexed to be made to the British Malaya Trustee & Executor Co., Ltd. On the following day a further petition was filed by A.H.M. praying that probate of the will be granted to him leave being reserved to the other of the executors to come in and prove the same.

Held, by the Court of Appeal, Thomas, C.J. (F.M.S.) and Cussen, J. (Mills, J., dissenting), upholding the decision of Whitley, Ag.C.J., reported in (1936) 5 M.L.J. 151, that the executor lost his absolute right to appointment by reason of his neglect within six months after the death of the testator to make an application for probate.

Held further, that the Court could pass over an executor on proper grounds and that such grounds existed in this case,

Per Cussen, J. The position of an executor, even when he has brought himself within the authority of Section 54, must still be considered. He cannot be passed over arbitrarily; there is not an open, free choice as between him and any other applicant. There must be reasonable grounds, judicially considered, for passing him over in favour of the Official Assignee or any other person.

APPEAL.

Walters for the Solicitor General (Respondent).

E. A. Stevens for three infant beneficiaries.

Batishill for Abdul Hameed Maricar (Appellant).

Cur. Ad. Vult.

THOMAS, C.J. (F.M.S.)—Hameed Natchial by her Will dated the 21st of February 1933 appointed Abdul Hamid Maricar and Mahamood Maricar to be her executors. She died on the 30th of May 1935.

Prior to the 5th of March 1936 no petition for probate had been filed either by the executors or by any other person. A period of over six months had therefore elapsed during which there had been no application for probate. On the 5th March 1936 the then Solicitor General filed a petition to which a photographic copy of the said Will was attached, praying that letters of administration should be granted to the British Malaya Trustee and Executor Company Limited.

On the 6th day of March 1936 Abdul Hameed Maricar filed a petition for probate. The delay for this application for probate by Abdul Hameed Maricar is explained by the statement that he was residing in India from the date of the death of the testator until the middle of January 1936.

The learned trial Judge, for the reasons given in his judgment, refused the petition for probate by Abdul Hameed Maricar, and allowed the petition of the Solicitor General, Straits Settlements, and ordered that letters of administration with the Will annexed should issue to the British Malaya Trustee and Executor Co., Ltd. From that judgment Abdul Hameed Maricar appeals.

At the appeal it was argued on behalf of the appellant that the Court must consider the petition of the executor first, and until that was disposed of could not consider the petition of the Solicitor General at all; and in considering the petition of the executor the Court could not refuse to grant probate on the ground of delay only, that not being one of the Common Law grounds for passing over an executor.

In the Straits Settlements there is an Ordinance (Cap. 51) dealing with probate and administration. Section 7 of this Ordinance provides that probate may be granted to any executor appointed by a Will. Sections 20 and 21 make provision in the case of infants and lunatics.